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Updates from the Regional Human Rights Systems

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UPDATES FROM THE REGIONAL HUMAN RIGHTS SYSTEMS

AFRICA

THE AFRICAN HUMAN RIGHTS SYSTEM originated with the founding of the Organization of African States (OAU) in 1963. In July 2001, 53 African heads of state ratified the African Union (AU) Constitutive Act, replacing the OAU with the AU. The AU has dominion over three mechanisms responsible for enforcing human rights treaties adopted by member states. The African Charter on Human and Peoples' Rights, entered into force in 1986, established the African Commission on Human and Peoples' Rights. This commission is responsible for hearing cases brought against state parties to the treaty. The African Charter on the Rights and Welfare of the Child, entered into force in 1999, created the African Committee on the Rights and the Welfare of the Child to enforce compliance with that treaty. Finally, the Protocol on the Establishment of an African Court on Human and Peoples' Rights, entered into force in January 2004, established a court for the enforcement of the African Charter on Human and Peoples' Rights. At the time of publication, the African Court on Human and Peoples' Rights was not yet operational (see below). Other treaties governing human rights issues in Africa are the Convention on Specific Aspects of the Refugee problem in Africa, entered into force in 1974, and the Protocol on the Rights of Women, currently under consideration.

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

The 35th Ordinary Session (Session) of the African Commission on Human and Peoples' Rights (Commission) took place in Banjul, the Gambia, from May 21 to June 4, 2004. Sudan, Burkina Faso, and Niger each submitted reports to the Commission detailing the human rights situations in their respective countries, but as of this writing the details of the reports had not been published.

The Commissioners passed five resolutions during the Session. Three focused on specific human rights conditions across the African Continent (Continent). The

Commission passed a resolution deploring the killing of dozens of civilians during the March opposition rallies in Cote d'Ivoire's largest city, Abidjan, and set to undertake a fact-finding mission to investigate other human rights violations in the country. A resolution on the conditions in Sudan deplored the "ongoing gross human rights violations" in the Darfur region and resolved to send a fact-finding mission to the area to investigate. A third resolution, citing deep concern over the ethnic and religious violence in Northern Nigeria in May 2004, urged the Nigerian government to bring perpetrators of human rights violations to justice and to compensate victims and their families. The Commissioners also decided to send a fact-finding mission to investigate alleged human rights violations in the northern part of the country. (For more on the situation in Nigeria, see page 18.)

In addition, the Commission passed a resolution urging member states to ratify the Protocol to the African Charter on the Rights of Women in Africa (Protocol). As of August 2004, only four countries—the Comoros, Libya, Namibia, and Rwanda—had ratified the Protocol. The Protocol is designed to go into effect 30 days after the 15th country deposits its ratification with the African Union.

During the Session, the Commission also created the post of Special Rapporteur on Human Rights Defenders in Africa and named Commissioner Jainaba Johm as the first person to hold that post. The Commission noted its deep concern over the impunity for threats, attacks, and acts of intimidation against human rights defenders across the Continent and called on all member states to protect them. Each State must now detail the measures taken to protect human rights defenders in their periodic reports to the Commission.

The 36th Ordinary Session of the African Commission is scheduled to be held in Dakar, Senegal, from November 23 to December 7, 2004. Among the issues delegates plan to discuss is a critical report on the

human rights situation in Zimbabwe. Commissioner Johm wrote the report following her fact-finding mission to the country in June 2002.

AFRICAN UNION

During its 3rd Ordinary Session from July 6 to 8, 2004, in Addis Ababa, Ethiopia, the African Union (AU) took action to clarify the African Continent's (Continent) human rights judicial system.

Following a proposal by Libya, the AU adopted Decision 45, which states that the African Court on Human and Peoples' Rights (ACHPR) and the AU Court of Justice should be integrated into a single court. The ACHPR was created in January 2004. The Court of Justice, established by Article 18 of the African Union's Constitutive Act in 2001, stated nothing about the Court's mandate, but called for a subsequent protocol to outline its function. That protocol has not been written. With the establishment of the ACHPR, human rights groups and governments were having difficulty distinguishing between the courts functions, which seemed to overlap.

In accordance with the Protocol that established the ACHPR, the AU accepted nominations for judges to the ACHPR during the 3rd Ordinary Session. The AU invited any State that ratified the Protocol prior to the session to submit nominations. As of this writing, the date for the election of the judges had not been announced.

KENYA

On September 2, 2004, the Kenyan High Court granted a Nairobi woman the right to proceed with an HIV discrimination case. It is the first case of its kind in Kenya. Justice Mary Mugo announced that she was allowing the case to go forward because of the universality of HIV/AIDS and the relevance of the issue for the people of Kenya.

The plaintiff, identified only as JAO, alleges she was fired from her job as a waitress in 2002 after a doctor revealed to her

employer that she was HIV-positive. The woman claims that the hospital where the doctor worked tested her without her consent. She is suing to get her job back and is seeking damages from her former employer, the doctor, and the hospital.

All defendants have denied the claims and asked the judge to dismiss the case. Attorneys for the former employer claim that the employer did not know about the woman's HIV status and that she was fired for her repeated absences.

RWANDA

The Rwandan government has asked the country's chief prosecutor to investigate several NGOs accused of promoting "genocidal ideology and ethnic division." The request followed the Rwandan Parliament's acceptance in June of a parliamentary commission report prompted by the murder of several genocide survivors. The commission report cited several civil society organizations, schools, and churches that officials suspected of undermining the Gacaca judicial system—the traditional court system set up to prosecute alleged perpetrators of the genocide. Among the organizations targeted by the report is the country's most prominent human rights organization, the Rwandese League for the Promotion and Defense of Human Rights. If the Attorney General determines that the charges against any of the organizations are credible, the government can ban the organizations and prosecute their personnel. Under Rwandan law, advocating ethnic differences is a crime punishable by up to 20 years in prison.

Human rights organizations claim that some Rwandan officials are manipulating the memory of the genocide in an attempt to quiet government criticism. Human Rights Watch says that Rwandan officials are interpreting the law too broadly, enabling them to label any opposition to the government as a promotion of ethnic division. The European Union has also expressed concern that the allegations cited in the parliamentary commission report are "insufficiently substantiated."

ZIMBABWE

Zimbabwean and international human rights groups are strongly criticizing a bill

aimed at restricting NGO operations. The new bill, which is scheduled for vote in the Zimbabwean Parliament in October, is widely expected to pass. The proposed bill forbids Zimbabwean NGOs from accepting donations from foreign organizations that work on governance and human rights issues, including public education about anti-corruption issues, transparency, and accountability. The bill would also set up a panel responsible for registering and vetting Zimbabwean NGOs. Critics say it is an attempt by President Robert Mugabe—who has long accused NGOs of interfering in Zimbabwe's politics—to quash criticism of his regime ahead of next year's elections. The government says the bill is necessary for national security reasons.

EUROPEAN COURT OF HUMAN RIGHTS

THE EUROPEAN COURT of Human Rights (Court) was established in 1959 by the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). Enforcing the obligations entered into by the Council of Europe's Contracting States, the Court is composed of the number of judges equal to that of the Contracting States. Any Contracting State or individual claiming to be a victim of a violation of the Convention may lodge a complaint with the Court. In its decisions, the Court takes into account the various legal systems of the Contracting States.

LEYLA ŞAHİN V. TURKEY

On June 29, 2004, the Court, seated in Strasbourg, France, delivered its judgment in the case of *Leyla Şahin v. Turkey* (Application No. 44774/98). In a unanimous decision, the Court rejected appeals by a Turkish student who was barred from attending Istanbul University Medical School because her headscarf violated the official university dress code. The Court held that principles of secularism and equality underlie the regulations imposing the restriction on the wearing of the Islamic headscarves and that the "pressing social need" to protect the rights and freedoms of students who do not wear headscarves justifies the measures. Thus, the Court concluded that the regulations did not violate Ms. Şahin's rights and freedoms under Article 9 of the European Convention, which guarantees the right to freedom of religion, in particular, the right to

manifest one's religion. Additionally, the Court considered the historical, political, and social context present in Turkey, concluding that the ban on Islamic headscarves was a valid way to take a stance against extremist political movements which "seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts."

On July 21, 1998, Ms. Leyla Şahin, a Turkish national, filed a case against the Republic of Turkey with the European Commission of Human Rights (Commission) under former Article 25 of the European Convention. The case was then transferred to the Court after the adoption of Protocol 11, which amended Article 25 to allow individual complaints and provided for compulsory jurisdiction of the Court for all States Parties. She alleged that a ban on wearing Islamic headscarf in higher-education institutions violated her rights and freedoms under Articles 8 (right to privacy), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), and 14 (prohibition of discrimination based on, *inter alia*, sex and religion) of the European Convention, and Article 2 of Protocol No. 1 (the right to education . . . in conformity with one's own religious convictions).

Ms. Şahin, a Turkish student born in 1973, wears the Islamic headscarf because she regards it as her religious duty and because she comes from a traditional and practicing Muslim family. She studied medicine at the University of Bursa, where she wore her headscarf during the four years of her studies. In 1997, she enrolled in her fifth year at the Cerrahpasa Faculty of Medicine at the University of Istanbul and continued to wear her headscarf.

On February 23, 1998, the Vice-Chancellor of Istanbul University issued a public proclamation of policy (circular) regarding students' admission to the campus. The circular mandated that students with head coverings and students with beards must not be admitted to lectures, courses, or tutorials. If a student refused to comply with these measures, the University would be compelled to take urgent disciplinary measures. Consequently, because Ms. Şahin wore a headscarf, the University denied her access to two written examinations, rejected her registration for a course,

and refused to admit her to a lecture. The University labeled Ms. Şahin's behavior as "not befitting of a student," and the dean of the faculty issued her a warning.

In July 1998, Ms. Şahin filed an application with the Istanbul Administrative court, seeking an order to set aside the circular. The Court dismissed her application in March 1999, ruling that both the regulation at issue and the individual measures taken were legal. In April 2001, the Turkey's Supreme Administrative Court dismissed her appeal.

After her participation in a protest against the ban on headscarves, University officials suspended Ms. Şahin for a semester. The Istanbul Administrative Court subsequently refused to quash the suspension, stating that the University's actions could not be regarded as illegal in light of the material in the case file and the settled case law on the subject. In 1999, Ms. Şahin left Istanbul to continue her education at the Faculty of Medicine at Vienna University. The Supreme Administrative Court decided not to examine the merits of her appeal in light of a law promulgated in 2000 that granted amnesty for disciplinary offenses and annulled any resulting penalties or disabilities.

In *Leyla Şahin v. Turkey*, the Court found that two principles, secularism and equality, which complement and reinforce each other, justified banning the wearing of the Islamic headscarf in Turkey. The Court began its analysis by stating that "in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected" (citing *Kokkinakis v. Greece*). The Court also cited its previous decisions in *Karaduman v. Turkey* and *Dahlab v. Switzerland*, where it found that the State may validly restrict wearing of Islamic headscarves if they conflict with the State's obligation to protect public order, public safety, and the rights and freedoms of others in the society.

The Court accepted that upholding the fundamental principle of secularism in the State of Turkey may be regarded as necessary for the protection of the democratic system. It further found that restrictions on manifesta-

tions of a particular religion are fully justified under Article 9, Section 2 of the European Convention, if the restrictions will ensure peaceful co-existence and will protect public order and the beliefs of other students.

The Court reaffirmed the notion that national authorities are, in principle, more suitable than an international court to evaluate local needs and conditions. It further stated that it can review the legitimacy of local authorities' actions under the European Convention only after granting these authorities a "margin of appreciation" or deference. The Court emphasized that this is especially true in the context of the relationship between state and religion, and in the sphere of education. Despite these remarks, the Court retained supervision to ensure that the regulation does not counter the principle of pluralism, conflict with other rights in the European Convention, or entirely negate the freedom to manifest one's religion or beliefs.

The Court maintained that gender equality is a principle implicit in the values underlying the Constitution of Turkey and is also one of the key principles of the European Convention, as well as a goal to be achieved by the member States of the Council of Europe. Consequently, it concluded that wearing a headscarf runs contrary to the furtherance of values of pluralism, respect for the rights of others, and equality before the law for men and women.

Further, the Court held that it must take into account the particular political, social, and historical situation in Turkey in order to evaluate the legitimacy of the regulation banning the wearing of Islamic headscarves in educational institutions. The Court identified issues at stake such as the protection of the rights and freedoms of others and the maintenance of public order. Because the religious symbol of the Islamic headscarf has taken on political significance in Turkey in recent years, the Court reasoned that limitations on the freedom to wear religious insignia can be seen as meeting a pressing social need to protect the principles of secularism and equality. In addition, the Court reasoned that extremist political movements present a danger in Turkey by "seek[ing] to impose . . . their religious symbols and conception of a society founded on religious precepts." The Court found that this danger

justified Turkey's regulation as a measure intended to preserve pluralism in the University. Finally, the Court stated that the manner in which the University applied its measures was not discriminatory, because it treated all forms of dress that symbolize or manifest a religion or faith the same by barring them from the University premises.

Based on the arguments presented above, the Court concluded that the University of Istanbul's regulations imposing restrictions on the wearing of Islamic headscarves, as well as the implementing measures, were justified in principle and proportionate to the aims pursued. As a result, the regulations were "necessary in a democratic society" and not in breach of Article 9 of the European Convention. The Court also found the regulations did not violate Articles 8, 10, and 14 of the European Convention, or Article 2 of Protocol No. 1, because the relevant circumstances were the same as those it examined in relation to Article 9.

The Court's rejection of an appeal by a Turkish student who was barred from attending Istanbul University medical school because her headscarf violated the official dress code could be a precedent-setting decision. The Court held that principles of secularism and equality justified the imposition of the ban and did not require the state to show evidence that wearing a headscarf in a state university could, in practice, undermine a public policy intended to protect the well being and rights of citizens. Further, the Court supported the justification that the regulation protects the rights and freedoms of others who do not choose to wear the headscarf. In its report on the issue of the headscarf ban in Turkey, Human Rights Watch warned that, because the Court's decision takes precedence over national court rulings, it could help the French government defend its case for the headscarf ban it imposed in high schools. Considering the trend toward restrictions on this type of religious expression in some European countries, its disproportionate and discriminatory effect on Islamic women, as well as the rise of anti-Islamic sentiment and xenophobia, Human Rights Watch reported that the Court's decision does not seem to contribute to the amelioration of the situation

or to protection of the principles of tolerance and pluralism in Europe.

INTER-AMERICAN SYSTEM

THE INTER-AMERICAN HUMAN RIGHTS system was created with the adoption of the American Declaration of the Rights and Duties of Man (Declaration) in 1948. In 1959, the Inter-American Commission on Human Rights (Commission) was established as an independent organ of the Organization of the American States (OAS) and held its first session one year later. In 1969, the American Convention on Human Rights (Convention) was adopted. The Convention further defined the role of the Commission and created the Inter-American Court of Human Rights (Court). According to the Convention, once the Commission determines a case is admissible and meritorious, it will make recommendations and, in some cases, present the case to the Court for adjudication. The Court hears these cases, determines responsibility under relevant regional treaties and agreements, and assesses and awards damages and other forms of reparation to victims of human rights violations.

The Court recently issued its first two opinions addressing issues of free speech. In both cases, the Court found for the complainants, who had been punished in their respective countries for defamation of character in the course of public dialogue. In *Canese v. Paraguay* and *Herrera Ulloa v. Costa Rica*, the Court found that the States violated Article 13 of the Convention, which protects freedom of thought and expression.

Although the Convention allows states to place limitations on the freedom of thought and expression in certain circumstances, the Court did not find that the facts presented in these cases warranted any such limitation. The Court determined that the criminal sanctions imposed by the State in each of these cases would act as a deterrent to free expression, leading to self-censorship and, ultimately, direct censorship. The Court decided to rule on these two cases to protect and promote the free expression of journalists and the general public, whose expression serves the public good.

CANESE V. PARAGUAY

The plaintiff in *Canese v. Paraguay* was a presidential candidate in Paraguay's first

democratic election in 1993, which took place after 35 years of dictatorial rule. Mr. Canese, who had been a national expert on energy issues for many years, was exiled from his country for seven years, returned at the fall of the dictatorship, and subsequently became a presidential candidate. During his presidential campaign, he spoke out against his opponent for financially benefiting from an improper relationship with the former dictator of Paraguay. After years of research, Mr. Canese believed his opponent, the director of a hydroelectric company, received tax exemptions from the former dictator to enhance his own financial standing and that of his company. Mr. Canese made these allegations on news programs broadcast over the radio and on television. A trial court found Mr. Canese guilty of defamation and ordered him to pay a fine and serve time in prison. Throughout his judicial proceedings, Mr. Canese was prohibited from leaving the country.

More than eight years later, the Paraguayan Supreme Court finally acquitted Mr. Canese. Although the Supreme Court eventually removed the penal sanctions against him, the Inter-American Court was concerned about the long-term consequences of his sentence, namely that it would silence other journalists who sought to denounce corruption in Paraguay.

The Court found that Article 13 only allows limitations on freedom of speech in exceptional circumstances of public interest, such as national security. In cases of public elections, however, the Court found that the public's interest in making intelligent and well-informed decisions outweighs the private interests of a candidate who has voluntarily put himself in the public view.

The Government of Paraguay argued that Article 11 of the Convention allows a government to make laws protecting the right to privacy, honor, and dignity of a person. Recent decisions by the European Court of Human Rights and the African Commission, as well as other international jurisprudence, however, bolstered the Court's decision that restrictions on speech should be minimal. Accordingly, the Court found that governments should attempt to strike a balance between protecting individual privacy and honor, while safeguarding

the public right to information. Democracy, the Court determined, is only possible when public scrutiny holds officials accountable; therefore, governments must be more tolerant of statements made during a political debate or in a context in which the subject of the comments voluntarily puts him or herself in the public eye.

HERRERA ULLOA V. COSTA RICA

In *Herrera Ulloa v. Costa Rica*, the Court again found a violation of Article 13's guarantee of freedom of thought and expression. Mr. Ulloa, a journalist for a national publication, published several articles on the illicit actions of Costa Rica's honorary representative to the International Organization of Atomic Energy during a national debate regarding foreign relations. A Costa Rican court imposed civil and criminal sanctions on Mr. Ulloa, ordering him to pay a fine, register on a national judicial delinquent list, and remove the articles from the internet. As a result of these sanctions, Mr. Ulloa also lost his job.

The Court determined that the State had violated Article 13 of the Convention by sanctioning Mr. Ulloa, finding that a substantial national interest in a free press outweighed the representative's right to privacy. Article 13 only allows for restrictions on speech that are specifically enumerated in the country's domestic law and exist for the purposes of protecting the rights or reputations of others, protecting national security, or protecting the public order. The Court found that none of those requirements were satisfied.

Canese and *Herrera Ulloa* were the first decisions by the Court to address freedom of speech. Through these cases, the Court recognized that protecting free speech is an essential step to ensuring true democracy in Latin America. These decisions also demonstrate the Court's willingness to expand the range of issues it will address in the future beyond extrajudicial killings and forced disappearances.

REQUESTS FOR ADVISORY OPINIONS

Currently, two requests for advisory opinions are pending before the Court. An advisory opinion is a non-binding opinion that reflects the Court's position on a particular

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issue, but does not relate to a specific case. Prior to issuing an advisory opinion, the Court accepts amicus briefs from interested parties anywhere in the world.

In April 2004, the Commission filed a request for an advisory opinion with the Court. The Commission asked the Court to define the manner in which the jurisprudence of the Inter-American human rights system can restrict or place requirements on domestic legislation regarding capital punishment. The Commission asked if the guarantees of the Convention and the Declaration are compatible with legislative measures that would: 1) deny persons sentenced to death access to judicial or other effective recourse to challenge the mandatory sanction imposed, 2) deny persons sentenced to death access to judicial or other effective recourse to challenge the sanction imposed based upon the delay or conditions under which the person has been detained, and 3) deny

persons sentenced to death access to judicial or other effective recourse to challenge the sanction imposed on the basis that they have a complaint pending before the Inter-American human rights system.

The Commission believes these restrictions would be incompatible because the Convention is a source of international obligation for OAS member states. The Commission asked the Court to interpret the Convention and the Declaration in relation to legislative measures taken by States Parties to determine whether they may proscribe legislation that is incompatible with international obligations.

In November 2003, Venezuela asked the Court to issue an advisory opinion to determine whether an organ exists within the Inter-American human rights system to oversee the actions of the Commission and provide a forum in which States Parties to the Convention could question the legality

of the Commission's actions. Venezuela then requested that the Court identify that body, if it exists, and describe the scope of its functions and powers. Venezuela is concerned that if the Commission violates its own legal statutes it could jeopardize the rights of States, as well as call into question the correct application of the Convention and other applicable international legal instruments.

HRB

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